

Kulvinder Singh (Migration) [2018] AATA 1939 (9 May 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Kulvinder Singh

CASE NUMBER: 1732061

DIBP REFERENCE(S): CLF2012/84459 CLF2018/60

MEMBER: Adrienne Millbank

DATE: 9 May 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 09 May 2018 at 5:23pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – Genuine spousal relationship – Relationship with third party – Withdrawal of sponsorship – Family violence – Sponsor’s debt – Shared basic house costs – Joint bank account – Nature of a share-house – Site visit to applicant’s home – Unreliable witness – Decision under review affirmed

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, Schedule 2 cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 November 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 27 April 2012 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Relevantly to this matter the primary criteria include cl.801.221.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(6)(b). Conflicting information had been provided in interviews conducted with the applicant's family during a site visit on 19 February 2015, and in statutory declarations provided by the applicant and his family members. On 27 April 2017, in a telephone interview, the sponsor confirmed that she was in a relationship with a third party; that the relationship with the applicant had ended; and she was withdrawing her sponsorship.
4. The applicant subsequently, on 1 June 2017, claimed to have suffered family violence at the hands of the sponsor. The Delegate concluded that the parties were not in a genuine relationship, and did not further consider this claim. The decision summary included the following:

Given that your sponsor admitted to being in a relationship with a third party when prompted with evidence, while you both had been claiming to be in a genuine and mutually exclusive spousal relationship with each other, I find that you and your sponsor did not have mutual commitment to a shared life to the exclusion of all others.

I have further serious concerns regarding the reliability and credibility of the information provided by you and your sponsor throughout the entirety of your application due to your submission of misleading and inconsistent information regarding your family's recognition of your relationship with our sponsor and the general nature of your relationship with your sponsor.

Therefore, I find you have not demonstrated that you were in a mutually exclusive, genuine and continuing relationship with your sponsor prior to the cessation of the relationship. Accordingly, I am not satisfied that you were the spouse or de facto partner of your sponsor (as defined under sections 5F and 5CB of the Act).

5. The applicant appeared before the Tribunal on 27 March 2018 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
6. On 9 April 2018 the applicant provided further evidence in support of his claim to have been in a relationship and to have suffered family violence at the hands of the sponsor.
7. The applicant was represented in relation to the review by his registered migration agent.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The applicant was born in the Punjab, India, in 1982. He first arrived in Australia on 10 October 2007, on a Student visa. He has claimed no previous relationships. He has been employed as a taxi driver in Brisbane since 2007.
10. The sponsor was born in the Philippines in 1963. She first arrived in Australia on 21 March 2006, on a Partner visa, sponsored by her then husband. This marriage was legally ended in divorce on 28 November 2011. She obtained Australian citizenship by grant in 2011.
11. The parties claimed at the time of application that they first met on 20 April 2011, when the sponsor booked a cab that the applicant was driving. They claim they entered into a committed, exclusive relationship on 12 June 2011, according to the applicant; or two weeks after first meeting, according to the sponsor. According to the applicant they moved in together 'in about August 2011'. They married in a civil ceremony at the Brisbane registry office on 18 February 2012. The Partner visa application was lodged on 27 April 2012.
12. On 21 April 2017, when phoned by the Department regarding second-stage processing, the sponsor acknowledged that she was not in a relationship with the applicant; that she was in fact in a long-term relationship with another person; and that she was withdrawing her sponsorship. On 3 May 2017, the Department sent a letter to the applicant inviting his response to this information. In his response, on 1 June 2017, the applicant claimed to have suffered family violence at the hands of the sponsor.
13. The issue in the present case is whether the applicant was in a genuine spousal relationship with the sponsor at the time the claimed family violence occurred.
14. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. A copy of a Queensland Marriage certificate was provided, certifying that the parties married on 18 February 2012 in the Brisbane registry office. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

Financial aspects of the relationship

17. Evidence was provided in the form of statements from 2012 to 2017 that the parties have had a joint bank account. They showed regular weekly deposits in the order of \$200 – \$250. They also showed occasional larger transfers, of around \$1000, into and soon after, out of, the account. At hearing the applicant stated that both he and the sponsor maintained their own personal accounts, which they used for personal expenses.
18. When asked about their joint financial arrangements, as a couple, the applicant stated that he and the sponsor agreed from the time he moved into the sponsor's house that they would each put in \$200 or \$250 to cover the rent and other household expenses. He claimed that the sponsor, despite this agreement, demanded that he put more into the kitty, because she had debts to pay. He claimed further that she demanded that he loaned her money, up to \$3000 – \$4000, towards the cost of three of her trips back to the Philippines. He claimed that the sponsor threatened to withdraw support for his visa application if he didn't comply with his demands. He claimed that she never repaid him the money she borrowed for these trips.
19. When asked about the sponsor's debt, its nature and amount, the applicant stated that he didn't know how much she owed, but thought it was around \$50,000, and that she incurred it by sending money back to her family in the Philippines. He stated that it was a bank loan, but that the sponsor never showed him the letters from the bank. He stated further that he never knew how much she had in her own personal bank account. In a written statement provided after the hearing, he stated that he offered to assist the sponsor with her debt by contacting the bank regarding financing options, but that she was defensive and would not allow him to assist her, apart from by lending or giving her money.
20. At hearing the applicant confirmed that he and the sponsor had no joint ownership of assets and no joint liabilities. He advised that he had his name removed from the parties' tenancy agreement lease when he received information from the Department that the sponsor had withdrawn her sponsorship.
21. Having considered the testimony provided by the applicant at hearing, and the documentary evidence, the Tribunal does not find that the parties have pooled their financial resources commensurate with being in a genuine spousal relationship. The Tribunal accepts that the parties had a shared account into which they each contributed a nominal amount to towards household expenses, but the amount each deposited, or was supposed to deposit under their agreement, appears to have been sufficient to meet only the most basic of shared-house costs. For this reason, the Tribunal does not find the joint account to show that the parties shared day-to-day living expenses as would be expected of a married couple.

Nature of the household

22. Copies of tenancy agreements and rent and bond receipts, in joint names, from 2013, were provided. Copies of mail addressed to the parties at the same address were also provided. Based on this evidence, the Tribunal accepts that the applicant shared residences with the sponsor.
23. At hearing, the Tribunal asked the applicant about a relationship goal he stated in a statutory declaration signed in January 2014, namely, that he and the sponsor were 'planning to start a family together'. The Tribunal pointed out that the sponsor at that time was 51 years old, and a grandmother. The applicant stated that their plan had always been to adopt children. When asked what steps they had taken towards adoption during the six and a half years of

their claimed relationship, he stated that they had not taken any steps towards adopting children.

24. On his application form the applicant had stated that the sponsor had one previous marriage, but no other relationships, and no children. At hearing he acknowledged that the sponsor had a son, and a grandchild. He stated that he knew that she had been in a de facto relationship, but thought that this had ended. He stated that he had not been to the Philippines with the sponsor, and had not met her son or her grandchild.
25. When the Department phoned the sponsor on 3 May 2017, she stated that she and the applicant were still living in the same house, but that they occupied separate bedrooms; that they were not in fact in a relationship; and that she was in a relationship with someone else. At hearing the applicant stated that he 'sometimes' slept in a separate room because he did shift work, as a taxi driver. He claimed that he and the sponsor shared the cooking and cleaning, when they were both in the house, but explained that he worked long hours and shifts. He suggested that the nature of his work contributed to his lack of awareness that the sponsor was in a relationship with someone else. The Tribunal finds these explanations for the sponsor's evidence unconvincing.
26. At hearing, the applicant claimed that he purchased furniture for the house, but named no significant items. He advised that the house was rented furnished.
27. The Tribunal accepts that the applicant shared a house with the sponsor, and that when in the house together, they shared the housework. On the basis of the evidence provided, the Tribunal finds that this was in the nature of a house-share or contrived marriage arrangement, rather than as a genuine spousal couple. The Tribunal does not accept that the parties have established and maintained a joint household where they have lived together as a spousal couple.

Social aspects of the relationship

28. Photos were provided showing the parties together; with one or two friends or witnesses at their wedding; and eating and socialising with other people.
29. Statutory declarations, similarly worded, signed in 2014 and purportedly written by the mothers of the applicant and the sponsor, were provided at the time of application. The parties' mothers declared that they were happy with the marriage, and that the parties were a 'suitable couple'. They both concluded by requesting 'the authorities' to grant a visa to the applicant so they could get on with their married lives.
30. On a site visit, to the applicant's family home in India on 19 February 2017, however, officers from the Department were advised by the applicant's mother, as well as his sister-in-law and neighbours, that the applicant was not married and not in a relationship. At hearing, the Tribunal referred the applicant to statements in his statutory declarations that his family all knew and were happy about his marriage. The applicant stated that his mother was hard of hearing, and that his sister-in-law lied to the officials because she wanted him to marry a friend of hers. He directed the Tribunal to statutory declarations provided by his mother and brother, subsequent to the site visit, in which his mother declared 'I could not hear very well and thought that it was some distant relative, I just said things that I now realise should not have said. I regret it so much'; and his brother declares, regarding his wife, 'I was upset and angry that she has created such a big problem for my brother for the sake of her own interest ... my wife was still thinking that (the applicant) should marry her relative'.
31. The Tribunal asked the applicant if his mother had been diagnosed with or treated for deafness. He stated that she had not. The Tribunal asked the applicant why his mother

would lie to a distant cousin, if she was happy about the marriage. He stated that his mother must have thought it to be none of the distant cousin's business, but provided no convincing reason why she would think this way. The Tribunal asked why, if all his family in India knew he was legally married, as he claimed in his statutory declaration of January 2014, his sister-in-law would be trying to match-make for him. He stated that he didn't know.

32. The Tribunal found the statutory declarations and the applicant's responses regarding the site visit to be unconvincing. There is nothing to suggest that the visit was not conducted with the usual protocols, and the applicant's mother and sister-in-law and neighbours provided detailed information that was not contested by the applicant, about the applicant and his life in Australia and about other family members, thus demonstrating that they could hear and understand the questions. The Tribunal finds that the applicant's mother and sister-in-law and neighbours did not recognise the applicant as being genuinely married, at the time of the site visit, in February 2017. The Tribunal finds that there was no social recognition of the relationship by the applicant's family. Given the changeable and contrived nature of the statutory declarations purportedly submitted by the applicant's mother, the Tribunal finds the statutory declaration provided by the sponsor's mother subsequent to the site visit to be similarly unreliable, and gives it little weight.
33. The Tribunal accepts, on the basis of the photographic evidence, that the parties have attended social activities together, but does not find, on the basis of the photographic evidence alone, that the parties were recognised and related to by friends and colleagues and the wider community, as a married couple, and that they planned and undertook social activities as a married couple. Because of the site visit, and the unreliable nature of the statutory declarations provided by family members, the Tribunal does not find that the parties have represented themselves to their families as being in a genuine spousal relationship.

Nature of persons' commitment to each other

34. A statement from October 2012 from the sponsor's superannuation account was provided, showing that the applicant was listed as a 20 per cent beneficiary. Given that the sponsor was, according to the applicant, unemployed or casually employed, during the relationship, and earned little, and given the applicant is a minor beneficiary, the Tribunal gives little weight to this statement as an indicator of commitment to the applicant.
35. A large number of statutory declarations were provided, signed by both parties, from 2012 to 2017. These were similarly worded, declaring for example that 'being together is a sheer joy'; that they have found 'the perfect partner', that they 'shared everything in life'; and that their love was 'limitless'; 'boundless'; 'our driving force'; and concluding with the request that the applicant be provided with a visa. The Tribunal places little weight on these declarations, having found the applicant to be an unreliable witness in relation to the issue of the site visit, and to have organised changeable and unconvincing statutory declarations from his family members.
36. The tribunal further finds the statutory declarations provided at all stages of the application to be inconsistent, unconvincing and contrived for the purpose of the visa application. For example, on April 2012, the applicant signed a statutory declaration in which he declared he 'vividly remembered the day, 20 April 2011', when he met 'the love of his life'. In another declaration, signed 29 May 2017, the applicant stated he met the sponsor 'around 11 June 2011', at a time when she was emotionally unstable, having been in another relationship.
37. The Tribunal raised the issue referred to in the record of decision, a copy of which was provided to the Tribunal, of the sponsor's Facebook entries. Printouts of these, comprising of photos and texts from 2011–2017, showed the sponsor to be in a family situation with another partner, and with no mention of the applicant. The applicant claimed at hearing that

he had no idea that the sponsor was still in a relationship with her former partner until he received the letter from the Department advising him that she had withdrawn her sponsorship. He stated that he worked long hours, and shift work. He indicated that he could not understand why the sponsor did this to him; why she 'stopped him from getting the visa'.

38. When questioned about the Facebook photos and profile and entries, the applicant claimed that he never knew that the sponsor was on Facebook. He claimed he had never seen a Facebook entry, not even at a friend's place; that he had no curiosity about or interest in Facebook; and that he had never thought to ask or find out whether his wife was on Facebook. The Tribunal finds these claims disingenuous, and, in any event, finds the applicant's ignorance (claimed or real) about the sponsor's Facebook activities, and the entries themselves, to indicate that the parties were not in a genuine spousal relationship.
39. The Tribunal found the applicant, as discussed above, to be an unreliable witness, prepared to submit contrived statutory declarations in support of his visa application. The Tribunal does not accept his claim that he believed himself to be in a genuine relationship with the sponsor up until the time he received the letter from the Department on 4 May 2017, when he was 'shocked' to learn that the sponsor was in another relationship and had withdrawn her sponsorship.
40. The Tribunal accepts that the parties have shared an address and sometimes a residence, over six years, but the evidence does not support, and the Tribunal does not find, that they lived together in a genuine spousal relationship during this time. The evidence does not support, and the Tribunal does not find, that they drew companionship and emotional support from each other as would be expected in a marriage of six years, and that they saw the relationship as long-term.

Findings

41. Having considered the evidence and the circumstances of the applicant, the Tribunal is of the view that the relationship was contrived in order to obtain a migration outcome. The Tribunal is not satisfied that the parties ever had a mutual commitment to a shared life to the exclusion of others; or that they were ever in a genuine and continuing relationship.
42. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant does not meet cl.801.221(2)(c). As the applicant does not meet cl.801.221(2)(c), he does not meet the requirement for the visa, and the Tribunal does not need to assess his claims to meet cl.802.221(6)(c).
43. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).
44. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

45. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).